

IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CWP No. : 347 of 2000

Reserved on: : 20.4.2007

Date of decision : May 16,2007

Ms. Suneeta Kumari & others.

...Petitioners.

Versus

Union of India & another

...Respondents

Coram

The Hon'ble Mr. Rajiv Sharma, J.

Whether approved for reporting ?¹. Yes

For the petitioners : Mr. Praneet Gupta, Advocate.

For the respondent No.1 : Mr. Sandeep Sharma, Asstt. Solicitor General of India.

For the respondent No.2: Mr. K.D. Sood, Advocate.

For the respondent No.3: Mr. Suneet Goel, Advocate.

Rajiv Sharma, J. (Oral)

Through this petition challenge has been laid to communication dated 2nd February, 1998 whereby Director (M) has approved regularization SKO/LDO dealership of respondent No.3 for locations Peo and Una in Districts Kinnaur and Una respectively.

The brief facts necessary for adjudication of this petition are that the respondent No.1 had issued office memorandum dated 1st April, 1997 for selection of dealerships and distributors. The copy of the same is marked as Annexure P-1. The main objective for the issuance of guidelines as per office memorandum dated 1st April, 1997 was to ensure faster and fair selection of suitable candidates, transparency in selection

¹ *Whether the reporters of Local Papers may be allowed to see the judgment?* Yes.

to prevent chances of irregularities and corruption and to economize expenditure incurred in the selection of dealers/distributors. The eligibility criteria has been prescribed under para 3 of the scheme. Para 9 postulates that the location will be advertised under appropriate category in two newspapers one English daily and one regional vernacular daily having maximum circulations within districts in which the dealership/distributorship is to be located. A minimum notice period of 30 days is required to be given to the applicants to submit their application and the last date for receipt of application is to be a working day. Para 10 of the scheme provides that application form can be obtained in person or by making a request by registered post by remitting Rs. 500- (non-refundable) by crossed account payee Demand Draft drawn on any scheduled bank or postal order in favour of the company concerned. Para 12 prescribes the procedure for scrutiny of application. Para 13 provides that the selection board will be called Dealer Selection Board and constitution for the same has been provided under para 13.1. Para 15 provides for schedule of interview for each Board and norms for evaluating the candidates has been laid under para 17. Para 18 deals with finalization of the panel and the time frame for selection is separately provided under para 20.

Mr. Praneet Gupta, Advocate appearing on behalf of petitioner has vehemently argued that after the issuance of office memorandum dated 1st April, 1997, the distributorship for SKO/LDO was to be allotted as per the procedure. Mr. Gupta has elaborated his submissions further by submitting that advertisement was required to be issued in two newspapers one English daily and one regional vernacular daily having maximum circulations within districts in which the dealership/distributorship is to be located and thereafter process strictly as

per Annexure P-1 was required to be gone into. The gist of Mr. Gupta's submissions is that despite the mandatory office memorandum dated 1st April, 1997, the respondent No.1 has issued communication dated 2nd February, 1998 whereby the Director (Marketing) has approved execution of two separate dealership agreements with respondent No.3 for location Peo and Una.

Mr. K.D. Sood, Advocate and Mr. Sunil Goel, Advocate appearing on behalf of respondent No.2 and 3 have supported the issuance of communication dated 2nd February, 1998 on the basis of one earlier communication dated February 7, 1991.

I have heard the parties and perused the record.

The main objective of the issuance of office memorandum dated 1st April, 1997 was to ensure faster and fair selection of suitable candidates, transparency in selection, to prevent the chances of irregularity and economize the expenditure incurred in the selection of dealership/distributorship. In order to achieve the main objectives mentioned in the scheme, the process of selection has been made broad based on the basis of para 9. It is provided in para 9 that locations included in the market plan were to be advertised under appropriate category in two newspapers one English daily and one regional vernacular daily having maximum circulations within districts in which the dealership/distributorship was to be located. The respondent No.2 admittedly has not issued any advertisement calling for the applications for dealerships/distributorship for SKO/LDO for locations Peo and Una. The issuance of communication dated 2nd February, 1998 on the basis of which the Director (M) has accorded approval for regularization of SKO/LDO in favour of respondent No.3 is subsequent to the guidelines framed vide office memorandum 1st April, 1997. Once the office

memorandum dated 1st April, 1997 (Annexure P-1) had been issued, every dealership/distributorship of SKO/LDO was required to be allotted in accordance with the same. There is a substance in the submission of Mr. Praneet Gupta, Advocate when he submitted that the regularization of dealership approved in favour of respondent No.3 is in breach of Annexure P-1.

The only ground mentioned for the issuance of communication dated 2nd February, 1998 is the letter dated 7th February, 1991 whereby the DGM (S) has recommended the case of respondent No.3 for a separate dealership agreement. The basis for recommending the case of respondent No.3 by DGM (S) is earlier communication dated 10.1.1974 addressed to DSO, Una read with letter dated 30.7.1977. One Sh. Amiykak Singh, Divisional Retail Sales Manager has filed an affidavit dated 14th November, 2006 in this petition. It will be pertinent to reproduce para 2 of the same for better appreciation of the rival submissions made by the parties:

“That despite best efforts on the part of the Company, Indian Oil Corporation, the original records of the case which have been attached with the reply on the basis of which reply has been prepared, particularly, Annexure R-2/5 whereby regularization proposal of various old dealers of Punjab, H.P. and Jammu & Kashmir had been recommended including the case of Krishna Coal Company is not traceable. The respondents crave indulgence of this Hon’ble Court to place this fact before this Hon’ble Court. The files which are available and are being maintained in the office at Shimla will be produced at the time of hearing.”

The contents of para 2 reproduced herein above of the affidavit dated 14th November, 2006 depicts deplorable state of affairs of the respondent No.2 company. It is intriguing to note that the communication dated 7th February, 1991 i.e. Annexure R-2/5 was available with respondent No.2 and communication dated 2nd February, 1998 was not traceable/available with it. The explanation given for non-production of this document dated 2.2.1998 as per the affidavit dated 14th November, 2006 is an eye-wash. This Court is of the firm view that the document should have been made available in original before this Court and since the same has not been done, this Court is left with no alternative but to draw adverse inference against the respondent No.2. The document i.e. Annexure R-2/5 has bearing on the entire case. **The possibility of withholding the original document (Annexure R-2/5) intentionally from this Court cannot be ruled out.** The issue in the present case pertains to distribution of State largesse. The memorandum Annexure P-1 has been issued on 1st April, 1997. The process of selection was to be initiated, continued and to be culminated strictly as per Annexure P-1 for the dealership of SKO/LDO. The respondent No.2 was definitely seized of the matter when Annexure P-1 has been issued on April 1, 1997 and still on the basis of a document which is not traceable as per its own affidavit, the respondent No.2 has chosen in a most arbitrary manner to regularize the distributorship of respondent No.3 for two locations i.e. Peo and Una.

The entire exercise it seems has been undertaken by respondent No.2 to favour respondent No.3 at the cost of candidates, who could have applied as per Annexure P-1 if the applications had been called after advertisement in two daily newspapers. There was no occasion for respondent No.2 to regularize the allotment of dealership to the respondent No.3 despite memorandum dated 1st April, 1997. The reasons

assigned in the reply-affidavit by respondent No.2 do not inspire any confidence. The only alternative left with respondent No.2 after the issuance of memorandum dated 1st April, 1997 was to advertise the location and to call for the applications and thereafter to complete the entire process but converse has been done by respondent No.2 to unduly favour respondent No.3 by regularizing the distributorship on the basis of letter dated 2nd February, 1998.

The Hon'ble Supreme Court has held in **Erusian Equipment and Chemicals Vs. State of W.B. 1975 (1) SCC 71** that the executive power under Article 298 of the Constitution of India of the Union and States to carry on any trade and to acquire, hold and dispose property and make contracts for any purpose is subject to Part III of the Constitution. Their Lordships of the Hon'ble Supreme Court have opined as under:

“Under Article 298 of the Constitution the executive power of the Union and the State shall extend to the carrying on of any trade and to the acquisition, holding and disposal of property and the making of contracts for any purpose. The State can carry on executive function by making a law or without making a law. The exercise of such powers and functions in trade by the State is subject to Part III of the Constitution. Article 14 speaks of equality before the law and equal protection of the laws. Equality of opportunity should apply to matters of public contracts. The State has the right to trade. The State has there the duty to observe equality, An ordinary individual can choose not to deal with any person, The Government cannot choose to exclude persons by discrimination. The order of blacklisting has the effect of depriving a person of equality of opportunity in the matter of public contract. A person who is

on the approved list is unable to enter into advantageous relations with the Government because of the order of blacklisting. A person who has been dealing with the Government in the matter of sale and purchase of materials has a legitimate interest or expectation. When the State acts to the prejudice of a person it has to be supported by legality.

The State can enter into contract with any person it chooses. No person has a fundamental right to insist that the Government must enter into a contract with him. A citizen has a right to earn livelihood and to pursue any trade. A citizen has a right to claim equal treatment or enter into a contract, which may be proper, necessary and essential to his lawful calling.”

The Hon’ble Supreme Court has held in *Ramana Dayaram Shetty Vs. International Airport Authority of India and others* 1979 (3) SCC 489 that administrative authority is equally bound by the norms, standards and procedures laid down by it for others. The Hon’ble Supreme Court has held in the following terms:

“Today the Government in a welfare State, is the regulator and dispenser of special services and provider of a large number of benefits, including jobs, contracts, licences, quotas, mineral rights, etc, The Government pours forth wealth, money, benefits, services, contracts, quotas and licences. The valuables dispensed by Government take many forms, but they all share one characteristic. They are steadily taking the place of traditional forms of wealth. These valuables which derive from relationships to Government are of many kinds. They comprise social security benefits, cash grants for political sufferers and the whole scheme of State

and local welfare. Then again, thousands of people are employed in the State and the Central Governments and local authorities. Licences are required before one can engage in many kinds of businesses or work. The power of giving licences means power to withhold them and this gives control to the Government or to the agents of Government on the lives of many people. Many individuals and many more business enjoy largesse in the form of Government contracts. These contracts often resemble subsidies. It is virtually impossible to lose money on them and many enterprises are set up primarily to do business with Government. Government owns and controls hundreds of acres of public land valuable for mining and other purposes. -These resources are available for utilization by private corporations and individuals by way of lease or licence, All these mean growth in the Government largesse and with the increasing magnitude and range of governmental functions as we move closer to a welfare State, more and more of our wealth consists of these new forms. Some of these forms of wealth be in the nature of legal rights but the large majority of them are in the nature of privileges. But on that account, can it be said that they do not enjoy any legal protection? Can they be regarded as gratuity furnished by the State so that the State may withhold, grant or revoke it at its pleasure? Is the position of the Government in this respect the same as that of a private giver? We do not think so. The law has not been slow to recognise the importance of this new kind of wealth and the need to protect individual interest in it and with that end in view, it has developed new

forms of protection. Some interests in Government largesse, formerly regarded as privileges, have been recognized as rights while others have been given legal protection not only by forging procedural safeguards but also by confining/structuring and checking Government discretion in the matter of grant of such largesse. The discretion of the Government has been held to be not unlimited in that the Government cannot give or withhold largesse in its arbitrary discretion or at its sweet will. It is insisted, as pointed out by Prof. Reich in an especially stimulating article on "The New Property" in 73 Yale Law Journal 733, "that Government action be based on standards that are not arbitrary or unauthorized". The Government cannot be permitted to say that it will give jobs or enter into contracts or issue quotas or licences only in favour of those having grey hair or belonging to a particular political party or professing a particular religious faith. The Government is still the Government when it acts in the matter of granting largesse and it cannot act arbitrarily. It does not stand in the same position as a private individual.

The State need not enter into any contract with anyone, but if it does so, it must do so fairly without discrimination and without unfair procedure". This proposition would hold good in all cases of dealing by the Government with the public, where the interest sought to be protected is a privilege. It must, therefore, be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largesse, the Government

cannot act arbitrarily at its sweet will and, like a private individual, deal with any person it pleases, but its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largesse including award of jobs, contracts, quotas, licences. Etc. must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from such standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory.”

Hon'ble Supreme Court in **Kasturi Lal Lakshmi Reddy Vs. State of J&K 1980 (IV) SCC** 1 has laid down the limitations which structure and control the discretion of the Government in regard to grant of largess by it. The first is in regard to the terms on which largess may be granted and the other, in regard to the persons who may be recipients of such largess. Their Lordships of the Hon'ble Supreme Court have held as under:

“So far as the first limitation is concerned, it flows directly from' the thesis that, unlike a private individual, the State cannot act as it pleases in the matter of giving largess. Though ordinarily a private individual would be guided by economic considerations of self-gain in any action taken by him, it is always open to him under the law to act contrary to his self-interest or to oblige another in entering into a contract or dealing with his property. But the government is not free to

act as it likes in granting largess such as awarding a contract or selling or leasing out its property. Whatever be its activity, the government is still the government and is, subject to restraints inherent in its position in a democratic society .The constitutional power conferred on the government cannot be exercised by it arbitrarily or capriciously or in an unprincipled manner; it has to be exercised for the public good. Every activity of the government has a public element in it and it must therefore, be informed with reason and guided by public interest. Every action taken by the government must be in public interest; the government cannot act arbitrarily and without reason and if it does, its action would be liable to be invalidated. If the government awards a contract or leases out or otherwise deals with its property or grants any other largess, it would be liable to be tested for its validity on the touch- stone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid.

Where any governmental action fails to satisfy the test of reasonableness and public interest discussed above and is found to be wanting in the quality of reasonableness or lacking in the element of public interest, it would be liable to be struck down as invalid, It must follow as a necessary corollary from this proposition that the government cannot act in a manner which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest.”

The Hon'ble Supreme Court has held in **Ajay Hasia Vs. Khalid Mujib Sehravardi 1981 (1) SCC 722** that any arbitrary or unreasonable action of "authority" would be violative of Article 14 of the Constitution of India.

Thier Lordships have held in **Ram and Shyam Company Vs. State of Haryana and others (1985) 3 SCC 267** that while disposing of public property State must give equal opportunity to all concerned and endeavour to fetch the best available price in public interest.

Hon'ble Supreme Court in **M/s Dwarkadas Marfatia and sons Vs. Board of Trustees of the Port of Bombay (1989) 3) SCC 293** has held that any authority covered under Article 12 of the Constitution of India cannot act arbitrarily even in contractual matters and must act only to further public interest.

In **Mahabir Auto Stores and others Vs. Indian Oil Corporation and others (1990) 3 SCC 752**, the Hon'ble Supreme Court has held that every administrative action must be fair and the State or its instrumentality engaged in commercial transaction must act reasonably and in just manner. The Hon'ble Supreme Court has held as under:

"It is well settled that every action of the State or an instrumentality of the State in exercise of its executive power, must be informed by reason. In appropriate cases, actions uninformed by reason may be questioned as arbitrary in proceedings under Article 226 or Article 32 of the Constitution. Reliance in this connection may be placed on the observations of this Court in Radha Krishna Agarwal v. State of Bihar. It appears to us, at the outset, that in the facts and circumstances of the case, the respondent company IOC is an organ of the State or an instrumentality of the State as

contemplated under Article 12 of the Constitution. The State acts in its executive power under Article 298 of the Constitution in entering or not entering in contracts with individual parties. Article 14 of the Constitution would be applicable to those exercises of power. Therefore, the action of State organ under Article 14 can be checked. See *Radha Krishna Agarwal v. State of Bihar* at p. 462, but Article 14 of the Constitution cannot and has not been construed as a charter for judicial review of State action after the contract has been entered into, to call upon the State to account for its actions in its manifold activities by stating reasons for such actions. In a situation of this nature certain activities of the respondent company which constituted State under Article 12 of the Constitution may be in certain circumstances subject to Article 14 of the Constitution in entering or not entering into contracts and must be reasonable and taken only upon lawful and relevant consideration; it depends upon facts and circumstances of a particular transaction whether hearing is necessary and reasons have to be stated. In case any right conferred on the citizens which is sought to be interfered, such action is subject to Article 14 of the Constitution, and must be reasonable and can be taken only upon lawful and relevant grounds of public interest. Where there is arbitrariness in State action of this type of entering or not entering into contracts, Article 14 springs up and judicial review strikes such an action down. Every action of the State executive authority must be subject to rule of law and must be informed by reason. So, whatever be the activity of the public

authority, in such monopoly or semi-monopoly dealings, it should meet the test of Article 14 of the Constitution. If a governmental action even in the matters of entering or not entering into contracts, fails to satisfy the test of reasonableness, the same would be unreasonable. In this connection reference may be made to *E.P. Royappa V. State of Tamil Nadu*, *Maneka Gandhi v. Union of India*, *Ajay Hasia v. Khalid Mujib Sehravardi*, *R.D. Shetty v. International Airport Authority of India* and also *Dwarkadas Marfatia and Sons v. Board of Trustees of the Port of Bombay*. It appears to us that rule of reason and rule against arbitrariness and discrimination; rules of fair play and natural justice are part of the rule of law applicable in situation or action by State instrumentality in dealing with citizens in a situation like the present one. Even though the rights of the citizens are in the nature of contractual rights, the manner, the method and motive of a decision of entering or not entering into a contract, are subject to judicial review on the touchstone of relevance and reasonableness, fair play, natural justice, equality and non-discrimination in the type of the transactions and nature of the dealing as in the present case.

The Hon'ble Supreme Court in *Kumari Shrilekha Vidyarthi and others Vs. State of H.P. and others (1991) 1 Supreme Court Cases 212* has held that every decision must be based on reasons and in case of arbitrary, unreasonable, or irrational State action, Article 14 of the Constitution of India is attracted. The Hon'ble Supreme Court has held as under:

Unlike a private party whose acts uninformed by reason and influenced by personal predilections in contractual matters may result in adverse consequences to it alone without affecting the public interest, any such act of the State or a public body even in this field would adversely affect the public interest. Every holder of a public office by virtue of which he acts on behalf of the State or, public body is ultimately accountable to the people in whom the sovereignty vests. As such, all powers so vested in him are meant to be exercised for public good and promoting the public interest. This is equally true of all actions even in the field of contract. Thus, every holder of a public office is a trustee whose highest duty is to the people of the country and, therefore, every act of the holder of a public office, irrespective of the label classifying that act, is in discharge of public duty meant ultimately for public good. With the diversification of State activity in a Welfare State requiring the State to discharge its wide ranging functions even through its several instrumentalities, which requires entering into contracts also, it would be unreal and not pragmatic, apart from being unjustified to exclude contractual matters from the sphere of State actions required to be non-arbitrary and justified on the touchstone of Article 14. It can no longer be doubted at this point of time that Article 14 of the Constitution of India applies also to matters of governmental policy and if the policy or any action of the government, even in contractual matters, fails to satisfy the test of reasonableness, it would be unconstitutional. (See *Ramana Dayaram Shetty v. International*

Airport Authority of India and Kasturi Lal Lakshmi Reddy v. State of Jammu and Kashmir). In CoL A.S. Sangwan v. Union of India while the discretion to change the policy in exercise of the executive power, when not trammelled by the statute or rule, was held to be wide, it was emphasized as imperative and implicit in Article 14 of the Constitution that a change in policy must be made fairly and should not give the impression that it was so done arbitrarily or by any ulterior criteria. The wide sweep of Article 14 and the requirement of every State action qualifying for its validity on this touchstone, irrespective of the field of activity of the State, has long been settled. Later decisions of this Court have reinforced the foundation of this tenet and it would be sufficient to refer only to two recent decisions of this Court for this purpose. It is now too well" settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua non to its validity and in this respect; the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind. The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An obvious test to apply is to

see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode "is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner which does not disclose any discernible principle which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that 'be you ever so high, the laws are above you'. This is what men in power must remember, always.

The Hon'ble Supreme Court has held in **Delhi Science Forum and others Vs. Union of India and another (1996) 2 SCC 405** that grant of contract/licences to private bodies/companies by government or statutory authority can be judicially reviewed on grounds of bad faith, based on irrational or irrelevant consideration as well as non-compliance of prescribed procedure or violation of Constitutional or statutory provision.

The Hon'ble Supreme Court has again reiterated the principles governing the distribution of state largess in **Association of Registration Plates Vs. Union of India and others (2005) 1 SCC 679**. Their Lordships of the Hon'ble Supreme Court have held as under:

“Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work. Article 14 of the Constitution prohibits the Government from arbitrarily choosing a contractor at its will and pleasure. It has to act reasonably, fairly and

in public interest in awarding contract. At the same time, no person can claim a fundamental right to carry on business with the Government. All that he can claim is that in competing for the contract, he should not be unfairly treated and discriminated, to the detriment of public interest. Undisputedly, the legal position which has been firmly established from various decisions of this Court, cited at the Bar (Supra) is that government contracts are highly valuable assets and the court should be prepared to enforce standards of fairness on the Government in its dealings with tenderers and contractors.”

The upshot of the above discussion is that the regularization made in favour of respondent No.3 of distributorship of SKO/LDO for two locations i.e. Peo and Una vide Annexure R-2/1 is unconstitutional and is liable to be struck down. Consequently the writ petition is allowed and Annexure R-2/1 dated 2nd February, 1998 is quashed and set aside. The respondent No.2 is directed to initiate fresh selection process on the basis of latest guidelines issued by respondent No.1 within a period of four weeks. To avoid inconvenience to the general public, the respondent No.3 is permitted to run the distributorship at Peo in Kinnaur and Una only for a period of seven weeks from today.

The petitioner is entitled to costs quantified at Rs. 20,000/- to be paid by respondents No.2 and 3 proportionately.

(Rajiv Sharma), Judge

May 16, 2007

Awasthi